No. 85-60

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WEST GULF MARITIME ASSOCIATION, COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, NEW ORLEANS STEAMSHIP ASSOCIATION, NEW YORK SHIPPING ASSOCIATION, INC., and SOUTH ATLANTIC EMPLOYERS NEGOTIATING COMMITTEE,

Petitioners,

—against—

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

The petition in this case is patently unworthy and should be denied.

Petitioners suggest that both the Second Circuit and the district court disregarded the fundamental principle of the law of arbitration, that the threshold decision as to whether there is an agreement to arbitrate and an issue arbitrable under that agreement is for the court. Pet. at 10-12.[1] The suggestion is manifestly false.

The existence of an agreement to arbitrate and a dispute falling within that agreement could not be clearer. The "Tampa" Agreement of May 4, 1981, Appendix G to Peti-

[1] References to the petition are denoted as Pet. at —.

tion, to which all petitioners admit they are parties, established the Emergency Hearing Panel (EHP) to hear and resolve "all cases relating to the Containerization Agreement" of the Management-ILA Master Contract. Pet. at 50a. The grievance in this case involved ¶ 5 of the Containerization Agreement and alleged that local practices in Galveston and Houston violate its requirement that the minimum size of a container gang be 18 men plus two drivers. Pet. at 18a.

Far from abdicating its judicial function, the district court decided the threshold questions. It did not wax overlong stating the self-evident, but specifically held:

> The EHP unquestionably has the authority to determine whether an issue is covered by the containerization provisions of the Master Contract. *Such authority is a necessary part of its general authority, expressly granted by the parties, to resolve disputes relating to the containerization provisions.*

Pet. at 10a. (emphasis supplied)

Having found an agreement and a dispute arbitrable under the agreement, the district court, in accordance with well-established law,[2] correctly declined to substitute its judgment for the decision of the panel. The court of appeals correctly affirmed.

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[2] *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 567-9 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-5 (1960); *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597-9 (1960); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557 (1964); *Warren Brothers Co.* v. *Cardi Corp.*, 471 F.2d 1304, 1309 (1st Cir. 1973); *Advance Publications Inc.* v. *Newspaper Guild*, 616 F.2d 614, 617 (2d Cir. 1980); *Andros Compania Maritima, S.A.* v. *Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978); *Radio Corp.* v. *Association of Professional Engineering Personnel*, 291 F.2d 105, 109 (3d Cir.), *cert. denied*, 368 U.S. 898 (1961); *Lodge No. 12, Dist. No. 37, Int'l Ass'n of Machinists* v. *Cameron Iron Works, Inc.*, 292 F.2d 112, 117 (5th Cir.), *cert. denied*, 368 U.S. 926 (1961); *Smith* v. *Union Carbide Corp.*, 350 F.2d 258, 260-1 (6th Cir. 1965).

Petitioners would assign error to the courts' refusal to review the merits of the arbitration by arguing that it was for the judiciary to decide whether the dispute should be heard by the EHP or in accordance with arbitration provisions of local contracts.[3] This, of course, would involve re-trying the merits, which the court would not do. Whether the union was correct that gang size and composition were governed by the Master Contract or management was correct that local contracts controlled, the fact remained that the dispute was still over the Containerization Provisions, and the parties had agreed to arbitrate *all* disputes over the Containerization Provisions before the EHP,—not before local tribunals and not before the courts.[4]

The district court and the Second Circuit, then, were eminently correct in finding an agreement to submit the issue in this case to arbitration before the EHP and in refusing to disturb the panel's decision. But, even if the lower courts had committed error, this would still not give rise to the kind of important question that warrants review by the Supreme Court. The law in this area is so well

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[3] Petitioners' argument that the "18 + 2" dispute must be arbitrated under local contracts has been rejected in related litigation by 3 other circuits. *Hampton Roads Shipping Ass'n* v. *International Longshoremen's Ass'n*, 746 F.2d 1015 (4th Cir. 1984); *West Gulf Maritime Ass'n* v. *ILA Deep Sea Local 24*, 751 F.2d 721 (5th Cir. 1985); *S.E.L. Maduro (Fla.), Inc.* v. *International Longshoremen's Ass'n*, No. 84-5639 (11th Cir. July 16, 1985) (available Aug. 8, 1985 on LEXIS, Genfed library, cases file); *South Carolina Stevedores Ass'n* v. *Local No. 1422, Int'l Longshoremen's Ass'n*, No. 84-2189 (4th Cir. June 19, 1985) (available Aug. 8, 1985 on LEXIS, Genfed library, cases file).

[4] In the classic tradition of disappointed litigants, petitioners argue that the EHP's interpretation involved a "change" in the contractual agreements and "resulted in a contract to which no party ever agreed." Pet. at 12-15. Petitioners contend that subsequent local contracts modified ¶ 5 of the Containerization Provisions. Significantly, what petitioners do not, and can not, claim is any modification of the agreement to arbitrate all containerization disputes before the EHP. The effect of any local contracts on ¶ 5, then, remains for the panel to decide.

established as to be etched in black letters. There is no conflict or misunderstanding among the lower courts. An occasional isolated error, if there were one, hardly should command the energies of this Court to correct it.

Though the petition purports to raise "Recurring Issues of National Scope and Importance," Pet. at 15, the reader looks in vain for any issues of law. There is an attempt, perhaps in hopes of whetting some interest, to raise an exaggerated—and irrelevant—spectre of additional costs being passed on to the public. There is an ill-concealed attempt to have this Court re-try the merits of the dispute before the EHP. But there is no legal question requiring clarification by the highest tribunal. The disappointment of a losing party is no more ground for this Court to grant certiorari than it is for lower courts to substitute their judgment for that of the arbitrators.

Dated: New York, New York
August 8, 1985

Respectfully submitted,

/s/ THOMAS W. GLEASON

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a. The origin of the container.

b. The name of the shipper.

c. The identity of the inland carrier delivering such cargo.

d. The name or names of the persons from whom the cargo is received, if other than the person named in "b." above and location of pickup.

e. The weight of the cargo.

f. A description of the cargo.

g. The final port of discharge of the container.

3. In trades in which outward foreign manifests are maintained, copies of such outward foreign manifests shall be made available for inspection. In all other cases, copies of the Bills of Lading shall be made available.

4. An historical file on each container shall be made available to show the movement of the container at any time period in question.

5. The above documentation shall be maintained for a period of six months from the date of sailing of the vessel.

C.) In addition to all of the above, the provisions of Rule 9 shall be strictly adhered to by all Carriers and Direct Employers. Obligations of a carrier provided for herein may be carried out by any agent designated by the carrier, including a direct employer or terminal operator.

3. MANAGEMENT-ILA EMERGENCY HEARING PANEL

The Management-ILA Emergency Hearing Panel shall also act as the Management-ILA Container Committee and all provisions of the June 19, 1981 Agreement dealing with the implementation and enforcement of the Containerization Agreement shall apply to implementation and enforcement of the Rules on Containers.

4. QUICK RESOLUTION—TELEPHONIC HEARINGS

A.) Where either the President of the ILA or the President of New York Shipping Association determines that speedy hearing and resolution of any issue under either the Rules on Containers or the Containerization Agreement is necessary, notice of meeting of the Executive Committee of the Management-ILA Emergency Hearing Panel must be called on twenty-four (24) hours telephonic notice. The Executive Committee of the Management-ILA Emergency Hearing Panel shall consist of the President of the NYSA, President of CONASA, President of the West Gulf Maritime Association and the President of the New Orleans Steamship Association, together with a Carrier member and a Direct Employer member of the Carriers Container Council.

B.) On the Union side, the Executive Committee shall consist of the President of the ILA, the Executive Vice President, the Secretary-Treasurer, the General Organizer, the Assistant General Organizer, and the President of the South Atlantic and Gulf Coast District.

C. Wherever practicable, hearings may be held in the port or ports where problems requiring speedy resolutions arise. Hearings may be held by telephone provided that at least three (3) representatives on each side are physically present at the meeting with any other representatives desiring to attend being present by telephone. The proceedings shall be conveyed to all members of the Executive Committee by telephone and all members of the Executive Committee may ask questions, confer and otherwise participate in the deliberations by the Executive Committee by telephone. A determination by the Executive Committee shall be rendered immediately by majority vote of the Executive Committee, each side having an equal number of votes without regard to the number of persons present. Such determination shall be final and binding, although any aggrieved party shall have the right to appeal the decision of the Executive Committee to the full Management-ILA Emergency Hearing Panel. Pending such appeal, the

determination of the Executive Committee shall immediately become effective and remain effective unless and until reversed by the full Panel. In the event of deadlock, the matter shall be referred to the full Panel for determination under provisions of the June 8, 1981 Agreement.

5. THE RIGHT TO STRIKE

The ILA shall have the right to refuse to render service to any carrier or direct employer who fails or refuses to abide by the decisions of the Committee or Panel after having been found to have violated any provisions of the Containerization Agreement until said carrier or direct employer comes into full compliance with said decision. The provisions of any "no strike" clause shall not be applicable in any such situation.

6. TARIFFS INAPPLICABLE

No carrier shall seek to justify any violation of the Rules on Containers or the Containerization Agreement on the grounds that its conduct is required by tariff provisions adopted by such carrier or by a conference of which said carrier is a member. Each carrier shall have an obligation to have any tariff provisions or allowances in conflict with the Rules on Containers or the Containerization Agreement changed as soon as possible consistent with the requirements of law.

7. LTL/LCL CARGO

LTL/LCL cargo subject to the Rules on Containers shall be brought to the pier in breakbulk form or loose form.

8. NO CONTAINERS TO CONSOLIDATORS

No steamship carrier shall supply any container, chassis or bogey, to an NVO or consolidator within the 50 mile zone and any such conduct shall be deemed a per se violation of the Rules on Containers and the carrier shall pay liquidated damages pursuant to paragraph 9.

9. LIQUIDATED DAMAGES

Liquidated damages as provided under Rule 7(c) of the Rules on Containers shall be applied in case of every violation of the Rules or of the Containerization Agreement, on and after May 26, 1983. Where the Executive Committee or full Panel determines that such violation has been willful, the amount of the liquidated damages shall be doubled. Evidence of willfulness shall include a change in the documentation relating to any container which has been made for the purpose of either evading the Rules or hiding evidence that the Rules have been violated.

10. CONTINUATION OF AGREEMENT

Except as modified by the above, the Master Agreement of May 27, 1980 shall continue, as amended, in full force and effect, including and without limitation the provisions of paragraph "8" of the Containerization Agreement. The Master Agreement to become effective October 1, 1983 shall include all provisions of the Containerization Agreement and Rules on Containers, as well as other agreements, together with amendments and including this procedural understanding.

IN WITNESS WHEREOF the parties hereto have set their hand this 29th day of July, 1983.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

By /s/ (illegible)
President

ATLANTIC COAST DISTRICT
ILA, AFL-CIO

By /s/ (illegible)
President

By /s/ (illegible)
Secretary

SOUTHEAST FLORIDA EMPLOYERS ASSOCIATION

By /s/ (illegible)
President

By /s/ (illegible)
Secretary

SOUTH ATLANTIC EMPLOYERS NEGOTIATING COMMITTEE

By /s/ (illegible)
Chairman

CARRIERS CONTAINER COUNCIL

By /s/ (illegible)
Chairman

SOUTH ATLANTIC AND GULF
DISTRICT, ILA, AFL-CIO

By /s/ (illegible)
President

By /s/ (illegible)
Secretary

NEW YORK SHIPPING
ASSOCIATION, INC.

By /s/ (illegible)
President

COUNCIL OF NORTH ATLANTIC
SHIPPING ASSOCIATIONS

By /s/ (illegible)
President

WEST GULF MARITIME
ASSOCIATION

By /s/ (illegible)
President

NEW ORLEANS STEAMSHIP
ASSOCIATION

By /s/ (illegible)
President

MOBILE STEAMSHIP ASSOCIATION

By /s/ (illegible)
President

By /s/ (illegible)
Secretary